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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM, by and through its Board of Administration, Plaintiff, vs. SAN DIEGO CITY ATTORNEY MICHAEL J. AGUIRRE; THE CITY OF SAN DIEGO and DOES 1-100, Defendants. AND RELATED ACTIONS	**Case No. GIC 841845** [Consolidated for all purposes with Case Nos. GIC 851286 and GIC 852100] I/C Judge: Hon. Jeffrey B. Barton Dept. 69 **STATEMENT OF DECISION FOR TRIAL PHASE ONE [PROPOSED BY INTERVENORS AND *ABDELNOUR* PLAINTIFFS]**

STATEMENT OF DECISION

This Statement of Decision for Trial Phase One in this action addresses the following special defenses at issue:

(1) whether the City can pursue a claim that SDCERS violated the debt limit laws;

(2) whether the *Corbett* settlement provides a bar to the litigation of the "MP I benefits";

(3) whether the City's 5ACC presents an actual, justiciable controversy between the City and necessary parties;

(4) whether the City's claims that the "MP I and MP II benefits" are null and void are barred because of the *Gleason* settlement and litigation; and,

(5) whether the City's 5ACC presents an actual, justiciable controversy on which this court can render a meaningful, concrete and specific decree.

1. INTERVENORS' SPECIAL DEFENSE THAT CLAIMS OF DEBT LIABILITY LIMIT LAW VIOLATIONS BY SDCERS DO NOT GIVE RISE TO A JUSTICIABLE CONTROVERSY IS SUSTAINED.

California Constitution, Article XVI, § 18, sets limitations on indebtedness or liability for each "county, city, town, township, board of education, or school district." San Diego City Charter § 99 sets limits on indebtedness or liability which the City of San Diego may incur. Ex. 1180-40-41. Because SDCERS is a public retirement system [City's Fifth Amended Cross-Complaint ("5ACC"), Ex. 796, ¶ 3] and is not a county, city, town, township, board of education, or school district and is not the City of San Diego [Ex.1103-3-4, Art. IX, sec. 141] and because, if any indebtedness in excess of the liability limits exists in this case, it was incurred by the City and not by SDCERS, the City's claim in the 5ACC that SDCERS violated Cal. Const. Art. XVI, § 18 and/or Charter § 99

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does not give rise to a justiciable controversy. *Pettinger v. Home S & L Assn.* (1958) 166 Cal.App.2d 32.

2. INTERVENORS' SPECIAL DEFENSE ASSERTING THE *CORBETT* JUDGMENT AS A BAR TO LITIGATION OF PENSION BENEFITS ENACTED BY OR BEFORE ENTRY OF THE JUDGMENT, INCLUDING BENEFITS FUNDED UNDER MP I, IS SUSTAINED.

In February and March 1997, the San Diego City Council amended the Municipal Code to codify new retirement calculation factors, among other retirement plan changes. San Diego Municipal Code §§ 24.0402 and 24.0403, Ex.1104-15-21. These changes were funded under an arrangement between the City and SDCERS now known as MP I. *See* Ex. 85, "Issue No. 2 – CERS Benefit Changes." The retirement plan changes enacted by the City in 1997 were in effect in July 1998 when *Corbett v. City Employees' Retirement System*, Case No. GIC 722449 was filed. The plaintiffs in *Corbett* asserted claims under *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement of Ventura County Employees' Retirement Assn.* (1997) 16 Cal.4th 483, that certain elements of City employees' compensation should be included as part of base compensation and, hence, used to calculate retirement benefits. Ex. 919.

Corbett was settled as a class action, with SDCERS members compromising substantial claims under the *Ventura County* decision in return for new, enhanced pension benefits. The settlement was embodied in a Judgment entered May 17, 2000 [Ex. 930] and in City legislation enacted in compliance with the settlement and judgment [Ex. 1193]. The *Corbett* benefits were based on and included all of the benefits funded under MP I (the "13th check" for pre-1980 retirees was included by mention in the *Corbett* settlement and judgment and was part of the package of benefits exchanged for *Ventura County* claims, though it was not increased). As acknowledged in the *Corbett* Notice of Pendency of Class Action [Ex. 1128- 6, ll. 1-5], SDCERS and the City filed an

Answer and Cross-Complaint alleging that the then-existing retirement benefits were properly calculated and paid under applicable law and agreements [Ex. 930-4, ll.8-10]. *Corbett* is final and binding on the Court. *See Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810-11.

Moreover, in responses to Intervenors' Special Contention Interrogatories here, the City averred, "The City is not challenging *Corbett* in this lawsuit." Response to Interrogatory No. 393, Ex. 779-58 and Ex. 1260-63. This interrogatory response is binding on the City. On its face, the *Corbett* Judgment and Notice resolved the parties' claims in the form of a net increase in retirement benefits, achieved by increasing the then-existing underlying benefits. The *Corbett* judgment did not provide that the parties settled for an increment only. The Notice advised, as to retirees, that "your retirement benefit . . . will increase by a simple seven per cent (7%), both prospectively and retroactively." As to active employees, the Notice advised that, "as a vested benefit," these employees could elect between a new, increased retirement factor and a "retirement benefit . . . calculated on the Retirement Calculation Factors in effect on June 30, 2000, and [such] retirement benefit . . . so computed will be increased by ten per cent (10%)." Ex. 930-5, ll.11-14 [retirees]; Ex. 930-7, ll. 9, 13-18 [lifeguard and safety members]; Ex. 930-8, ll. 4, 8-14 [General Members]; Ex. 930-9, ll. 4-21 [DROP participants]. The evidence established that benefits associated with MP I, including purchase of service credit, disability income offset elimination, disability retirement benefit increase for General Members, and DROP (Deferred Retirement Option Plan) participation were among the underlying benefits existing at the time of, and increased by, the *Corbett* judgment. All of the benefits funded by MP I were part of the *Corbett* package exchanged for *Ventura County* claims. As such, they became part of the *Corbett* judgment and ordinance passed to implement the judgment.

Any claims based on pre-*Corbett* benefits have been merged in the *Corbett* judgment. *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1770. The benefits in effect at the

time of, and underlying, the *Corbett* Judgment, including benefits funded under MP I, cannot now be set aside because doing so would invalidate the *Corbett* judgment. Accordingly, the City is estopped from pursuing claims which seek to invalidate such benefits. *See Sawyer v. The City of San Diego* (1956) 138 Cal.App.2d 652, 662; *City of Coronado v. City of San Diego* (1941) 48 Cal.App.2d 160, 172. The City is estopped regardless of whether or not the parties raised issues in *Corbett* of the legality or validity of existing benefits or intended to litigate such issues. *Spray, Gould & Bowers v. Associated Int. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1267 (estoppel may arise from silence where there is a duty and an opportunity to speak). Intervenors' special defense based on the *Corbett* judgment is sustained. Benefits enacted by or before the *Corbett* judgment cannot be nullified in this action.

3. INTERVENORS' SPECIAL DEFENSE THAT THE 5ACC DOES NOT PRESENT AN ACTUAL, JUSTICIABLE CONTROVERSY BETWEEN THE CITY AND NECESSARY PARTIES IS SUSTAINED.

The City seeks declaratory relief that benefits "granted under" MP I and MP II are illegal and void. The persons most likely to challenge the relief sought by the City are the individual employees, retirees, and beneficiaries who are participants in SDCERS. The evidence established that SDCERS participants and beneficiaries are known. The interest that a current or former employee or retiree (or his/her beneficiary) has in a particular retirement benefit is an individual interest. *See Gibson v. City of San Diego* (1945) 25 Cal.2d 930, 937 (statutory pension provisions become part of contemplated compensation for services and thus a part of contract of employment itself). SDCERS participants and beneficiaries are subject to service of process and must be joined as parties, because disposition of the City's claims to invalidate their benefits in their absence will as a practical matter impair their ability to protect any interest they may have or claim in current or future retirement benefits and will leave SDCERS and the City subject to substantial risk of

incurring multiple or inconsistent obligations as a result of the participants' claimed interests. C.C.P. § 389(a). Under § 389(a), the Court is duty-bound to order that the participants and beneficiaries be made parties as long as the City seeks relief which may impair their pension benefit rights. *Tuller v. Superior Court* (1932) 215 Cal. 352, 355 (court's nondiscretionary duty arises once court identifies an absent necessary party). When persons who are most likely to challenge a request for declaratory relief are not before the court, any opinion rendered is advisory and not within the court's function or jurisdiction. *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860; *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1081.

The evidence presented at trial established that there are more than 17,000 participants in SDCERS, of whom approximately 14,000 would be impacted by the relief sought by the City. Ex. 1437. Of those participants, only 194 individual current or former employees are before the Court as members of the *Abdelnour* plaintiff group. The 5ACC states no claims against the *Abdelnour* plaintiffs. Ex. 796.

Of the parties before the Court, SDCERS is the only cross-defendant sued in the 5ACC. SDCERS does not have a duty to ensure that a particular level of benefits or a particular type of benefit is offered or maintained. SDCERS has entered into a Stipulation with the City agreeing to be bound by any orders and judgment of the Court concerning the benefits and has not participated actively in Phase 1. Therefore, SDCERS' interest is not coextensive with the interests of participants in the system in preserving their particular level of benefits.

The City does not have standing to represent the participants in the Retirement System or their interests, and the relief sought by the City here in effecting a forfeiture of pension benefits is adverse to participants, even taking into account the City's argument that participants have an interest in an actuarially sound pension plan. Receipt of full promised retirement benefits and a sound plan are neither mutually exclusive nor inconsistent interests; however, the City's requested

invalidation of benefits remains adverse to participants. *See City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59 (actions must be prosecuted in the name of the real party in interest; standing is a function not just of a party's stake in a case but of the degree of vigor or intensity with which he or she litigates that interest).

Although Intervenor Unions have the capacity to sue and be sued in their own name [C.C.P. § 369.5(a)], the Unions have standing, and have participated in this action, specifically to enforce their collective bargaining agreements with the City. *See* Cal. Labor Code § 1126. While employees in bargaining units represented by Intervenor Unions are bound by the terms of the MOUs negotiated by their Unions, the Unions nonetheless cannot bargain away nor waive the employees' individual constitutional rights. *Phillips v. State Personnel Board* (1986) 184 Cal.App.3d 651, 660, disapproved on another ground in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123 n.8. Contractual vested pension rights in the MOUs inure to the individual employees and enjoy constitutional protection. Pension rights are part of compensation for services rendered, vest upon acceptance of employment, and are earned as the employee performs services. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-53. Thus, City employees have individual due process interests in protecting their pension benefit rights.

The appearance by the Unions as plaintiffs in intervention is not the equivalent of appearance of their individual members as parties. Labor unions are separate legal entities from their members. "[I]ndividual members of . . . unions are not in any true sense principals of the officers of the union or of its agents and employees so as to be bound personally by their acts under the strict application of the doctrine of respondeat superior." *Marshall v. Int'l. Longshoremen's Union* (1962) 57 Cal.2d 781, 784. "The member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest." *DeMille v. American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 149. A member of an unincorporated

association does not consent to incur any obligation of the association by reason of joining or becoming a member. Even if liability for an obligation of the association were argued to extend to association members, before any liability may be assessed against a member of an unincorporated association, service of process on the individual in his or her individual capacity must be made. *Barr v. United Methodist Church* (1979) 90 Cal.App.3d 259, 272-73, *cert. denied*, 444 U.S. 973, *reh. denied*, 444 U.S. 1049. A judgment *in personam* may not be entered against one not a party to the action, and such a judgment is void. *Fazzi v. Peters* (1968) 68 Cal.2d 590, 594. As a result, complete relief cannot be accorded among those presently parties. The involvement of Intervenor Unions in this case is not equivalent to joinder of their participant members.

Apart from Intervenor Unions, in addition, neither the San Diego Police Officers Association nor the Deputy City Attorneys Association is before the court in any capacity, and more than a thousand San Diego police officers have objected to determination of their rights in this action in their absence. Ex. 1438.

Beyond contentions of the adequacy of the Unions' appearance on behalf of their members, the evidence established that some employees represented by Intervenor Unions are not members of the Unions and that the Unions do not represent retirees and former employees as a factual and legal matter. Gov. Code §§ 3501(d), 3505(a). The City seeks to set aside some benefits, but not others (*e.g.*, 2.5% at 55 for General Members on a "going forward basis" [Response No. 434, Ex. 779-68, 1260-73]), making some participants, including Union members, adverse to others. The City concedes that those not before the Court will not be bound by a judgment in this action and can relitigate pension claims. This raises the risk of inconsistent judgments. In addition, because impairment of contract caused by a city's suspension of vested benefits is a deprivation of rights under color of state law which gives rise to a claim under 42 U.S.C. § 1983 [*Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598, 1609-10, *review denied*], if the City were to prevail and

the Court were to declare benefits invalid, the affected employees and retirees would have an independent federal constitutional basis to sue. While the City and SDCERS may have the resources to volunteer to assume the risk of inconsistent judgments, the participants likely do not, and the taxpayers and Court have an interest in a complete resolution.

SDCERS participants are necessary parties. Intervenors have met their burden of proof under C.C.P. § 389(a) that individuals with substantial interests which may be impaired by invalidation of pension benefits sought by the City are not before the Court. *Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 350 (employees are indispensable parties in action for writ of mandate and declaratory relief seeking rescission of public agency's payment of employees' share of Social Security contributions on the ground that such payment was an illegal gift of public funds, because agency might be subject to inconsistent judgments later in actions by employees who were not parties). SDCERS participants can be made parties; therefore, the Court does not reach C.C.P. § 389(b). Notice to participants was given in *Corbett* when new benefits were conferred and in *Gleason* and *McGuigan* to notify participants of additional funding to the Retirement System. In this case, in which the City seeks to invalidate vested rights to benefits as "illegal," individual notice to participants and opportunity to be heard is required due process.

In the absence of all SDCERS participants, any opinion rendered would be advisory and outside the court's function and jurisdiction. *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860. Accordingly, Intervenors' special defense challenging the City's failure to join necessary parties is sustained.

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4. INTERVENORS' SPECIAL DEFENSE THAT THE *GLEASON* JUDGMENT BARS THE CITY'S CLAIMS IS SUSTAINED.

A. The Court sustains Intervenors' special defense that the *Gleason* judgment bars the remaining causes of action in the City's 5ACC in their entirety because the City did not file these causes of action as a complusory cross-complaint in *Gleason*.

The Court finds that, if the absent, but necessary, participants were joined in this action, the *Gleason* settlement and judgment would bar the City's claims against such individual participants in this action under the doctrine of *res judicata*, because the City's claims in this action would have been the subject of a compulsory cross-complaint in *Gleason*.

A party against whom a complaint is filed and served must assert in a cross-complaint any related cause of action he or she has against the plaintiff at the time of filing the answer or be precluded from asserting the related cause of action in any other action against the plaintiff. C.C.P. § 426.30(a). A related cause of action for purposes of the compulsory cross-complaint rule is one which arises out of the same transaction, occurrence, or series of transactions or occurrences. C.C.P. § 426.10. The bar arising from the failure to assert a compulsory cross-complaint applies to related causes of action regardless of whether such causes of action were actually litigated or decided in a prior action between the parties. *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156-1157.

Gleason I included a plaintiff class of retirees and former employees whose pension benefits were funded under MP I and MP II, with SDCERS and the City as defendants. Ex. 961. The plaintiffs sought declaratory relief and damages based on allegations that, in adopting MP I and MP II, the City and SDCERS had violated various laws, breached their fiduciary duties, and rendered the pension plan "actuarially unsound," thereby unconstitutionally impairing plaintiffs vested contractual rights.

The City's 5ACC here alleges that MP I and MP II and all benefits funded in connection with them are illegal and void because certain SDCERS Board Members violated Gov. Code § 1090 when approving the MP I and MP II funding proposals and because the funding violates debt limit liability laws. In order to place the benefits in issue, the City's 5ACC is premised on allegations that MP I and MP II constituted a "single integrated transaction" with MOUs and legislation under which increased retirement benefits were traded for underfunding the Retirement System and that, under Gov. Code § 1092, the resulting benefits are void *ab initio*. The Court finds that the City's claims to invalidate benefits arise out of the same transaction or series of transactions as were in issue in *Gleason I* and were, therefore, compulsory cross-claims in *Gleason*. The City did not file a cross-complaint in *Gleason* to challenge the legality or validity of the pension benefits enacted as a result of the MP I and MP II funding agreements. The City elected not to challenge these benefits and instead asserted an affirmative defense that plaintiff class had received all payment and benefits to which its members were entitled and had not sustained any damage or harm cognizable under California law. Ex. 1434-4, ll. 4-7.

The City's failure to assert a cross-complaint against the plaintiffs in *Gleason I* challenging benefits bars litigation of such claims here. *Gleason* is *res judicata* as to those *Abdelnour* plaintiffs and all other participants who were members of the *Gleason* plaintiffs class. The Stipulation between the City and SDCERS at the start of the trial further recognizes that the 5ACC is, in reality, a claim by the City against all of its employees and retirees. Because the City reaches the benefits as a legal matter only through its allegations that they constitute a "single transaction" with the MP I and MP II funding agreements and are, therefore, void *ab initio*, and/or that the benefits as a whole violate debt liability limits, *Gleason* cannot be *res judicata* as to some of the benefits or some of the participants, but not all. Therefore, all issues which were or could have been litigated in *Gleason* were merged in the settlement and judgment and are conclusive as to this action. Ex. 783; *Johnson*

v. American Airlines (1984) 157 Cal.App.3d 427, 431 (court-approved settlement pursuant to final consent decree in federal class action binding on class members); C.C.P. § 1908 (parties to a proceeding cannot question the conclusiveness of the judgment as to any matters litigated or litigable). Accordingly, the Court sustains Intervenors' special defense asserting that the *Gleason* judgment bars the remaining causes of action in the City's 5ACC in their entirety.

B. The Court also sustains Intevenors' special defense that the *Gleason* judgment bars the remaining causes of action in the City's 5ACC as to MP II because the Gov. Code § 1090 claims were litigated in *Gleason* by a party in privity with the City.

In *Gleason II*, plaintiff Gleason in his capacity as a resident of the City of San Diego sued to void MP II in order to vindicate the public's rights under Gov. Code §§ 1090 and 1092 to be free of a government contract allegedly made under the influence of financial conflicts of interest. Ex. 962. Once litigated, claims seeking to vindicate a public right may not be re-litigated by other offended members of the public or parties with standing to sue. *Gates v. Superior Court* (1986) 178 Cal.App.3d 301, 307-308 (taxpayer action against individual police officers to recover funds spent on allegedly illegal intelligence gathering on non-violent organizations, held barred by settlement of six prior actions related to same activities; even though new action sought different remedy from the prior settled actions, action was based on same primary right violated and parties were therefore in privity).

Although, in *Gleason II*, the City was not named as a defendant, San Diego resident Gleason asserted the same primary right under §§ 1090 and 1092 as the City alleges in this case. There was a final judgment, through settlement, in the consolidated *Gleason* actions, which terminated both MP I and MP II. The Court concludes that, under *Gates, supra*, Gleason and the City were, and are, in privity in asserting rights on behalf of the public under Gov. Code § 1090 arising out of MP II. As

such, on an additional and independent basis, the Court concludes that the § 1090 claims regarding MP II which the City seeks to litigate in this action were already litigated in *Gleason* and are barred in this action by the doctrine of *res judicata*.

5. INTERVENORS' SPECIAL DEFENSE THAT THE 5ACC DOES NOT PRESENT AN ACTUAL, JUSTICIABLE CONTROVERSY ON WHICH THE COURT CAN ENTER A MEANINGFUL, CONCRETE AND SPECIFIC DECREE IS SUSTAINED.

For purposes of the remedy issue, the Court assumes, but has not decided, the existence of Gov. Code § 1090 and/or debt liability limit law violations.

The Court has concluded, above, that all necessary parties are not before the Court. Without all necessary parties, the Court cannot enter a meaningful or complete decree. Therefore, the 5ACC, which attempts to settle rights of SDCERS' participants and beneficiaries who are not before the Court as parties, is not justiciable in their absence. *See City of Santa Monica v. Stewart, supra*, 126 Cal.App.4th at 59 (action not founded on actual controversy between the parties brought for purpose of securing determination of point of law or to settle rights of third persons who are not parties is collusive and will not be entertained).

The Court allowed the City latitude to present factual evidence in support of its argument that the Court may use its equitable power to issue a remedy setting aside retirement benefits of participants, in their absence, because Union officials' knowledge of events related to MP I and MP II and of meet-and-confer related to benefits funded by MP I and MP II may be imputed to Union members. However, case law applicable to unincorporated associations (*see Marshall v. Int'l. Longshoremen's Union, supra*, and *DeMille v. American Fed. Of Radio Artists, supra*, discussed above at page 6) does not support the City's legal argument, and imputed knowledge as a general agency principle by itself is not a legal basis either for determining rights of absent, but necessary, SDCERS participants or for imposing a forfeiture or other liability on participants. The City did not,

in any event, establish as a factual or legal matter, that knowledge may be imputed to retirees, to former employees, to unrepresented employees, to members of Unions other than Intervenor Unions, between Unions to members of another Union, to non-members of Intervenor Unions, to employees who began employment after the occurrence of the event(s) about which the City seeks to charge them with knowledge, or to participants based on their right to elect SDCERS Board members in certain positions.

While the Court finds that there is no legal authority to proceed in the absence of necessary party SDCERS participants or to impose a remedy on participants based on imputed notice, the Court notes that the evidence of notice established that the sources of knowledge urged by the City to be imputed to participants were the SDCERS Board in open sessions and the City itself in open Council sessions and across the bargaining table in meet and confer since 1996. The Court notes that evidence was also presented that information communicated by the SDCERS Board and by the City offered assurances that experts and consultants, including representatives of the City Attorney's Office and outside counsel and actuaries, had reviewed SDCERS and City actions and that all such actions were lawful and permissible. The Court notes that notices to participants in the *Corbett*, *Gleason*, and *McGuigan* matters also fostered confidence in actions of SDCERS and the City related to the pension benefits at issue. Intervenor Unions – and employees and retirees generally – did not owe a duty to the City or to SDCERS to ensure their compliance with their legal obligations. *See Schneider Moving & Storage Co. v. Robbins* (1984) 466 U.S. 364, 375-76 (union owed trustees no statutory nor contractual duty to pursue collection of unpaid employee benefit contributions required to be made by terms of collective bargaining agreement); *Perry v. Local Union No. 56, IBEW* (1979) 468 F.Supp. 1299, 1301 (union owed no duty to ensure that employer obtained workers compensation insurance).

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The evidence also established that, in 2004, following *Gleason*, City voters passed Proposition G, which amended the Charter to preclude future multi-year funding agreements between SDCERS and the City delaying full actuarial funding of the Retirement System and to limit future permissible amortization schedules. The voters enacted Prop G, having been told in the City Attorney's Impartial Analysis of the ballot measure that "the City, not the City employees, is legally responsible for making any contributions necessary to rectify" unacceptably high UAAL (unfunded accrued actuarial liability) and underfunding. Ex. 1465.

Thus, even if imputed notice provided an equitable basis for relief, based on the evidence, the equities would tip in the participants' favor, not the City's.

Regardless of absent parties, the City has requested that the Court order a remedy addressed to a systemic underfunding problem of the Retirement System. Even though the parties offered evidence concerning SDCERS' assets and liabilities, levels of unfunded liability, and the cost of benefits, "systemic" funding problems and issues of "actuarial soundness" of the Retirement System are not within the scope of the remaining allegations of the 5ACC, are not relevant to Trial Phases 1 or 3, and do not raise a justiciable controversy as to which the Court can issue a remedy in this case. *See City of Santa Monica v. Stewart, supra*, 126 Cal.App.4th at 69-70 (even where issue concerns public interest, court will not issue advisory opinion or resolve disputes over matters which involve parties not before the court).

The City has asked the Court to declare benefits enacted following MP I and MP II illegal and void without ordering a specific remedy, then to stay its judgment for 90 days, and to allow the City Council to deal with the requested declaration of the Court, after which individual participants could be given notice and the opportunity to file claims. The City proposes that meet and confer and negotiations would then occur. The Court concludes, first, that the City has not requested a declaration of the legal rights and duties of the parties which would be concrete, specific, and, above

all, enforceable under C.C.P. § 1060. The remedy requested by the City would instead initiate a political free-for-all, under the threat of halting the payment of retirement benefits, which would render this lengthy litigation unremedied and potentially meaningless. Second, the City's requested remedy of after-the-fact notice and opportunity to be heard does not afford necessary, but absent, parties due process.

Charter § 24.1608 does not give the Court general authority to amend the Retirement System. Charter § 24.1608 applies to the City's separate "Preservation of Benefit Plan" established in March 2001 by Ordinance O-18930 (N. S.) as a "qualified governmental excess benefit arrangement" solely for the purpose of providing full benefits to those SDCERS members whose benefits at the time of payment are reduced by Internal Revenue Code § 415. Ex. 1104-95-100 (Div. 16); Ex. 1442.

Assuming violations of Gov. Code § 1090 and/or debt liability limit laws, the Court does not have authority to set aside portions of past-performed or current MOUs. Because, as the evidence before the Court showed, wages, benefits, and other terms and conditions in labor agreements, including the MOUs here, are "inextricably interwoven" and employees may, and did, surrender positions as to one to procure the other, the Court cannot invalidate portions of the MOUs. *Sonoma County Organization of Public Employees, et al. v. County of Sonoma* (1979) 23 Cal.3d 296, 308-309. The Court lacks authority to order the City to enter into a particular, judicially created collective bargaining agreement [*Pomona Police Officers' Association v. City of Pomona* (1997) 58 Cal.App.4th 578, 590] or to issue a remedy which would permit the City to repudiate all or parts of past performed MOUs or of current MOUs during their terms [*Morgan v. City of Los Angeles Board of Pension Commissioners* (2000) 85 Cal.App.4th 836, 844, *review denied* ("Having entered into a collective bargaining agreement, a party cannot retain that part of an agreement which creates a benefit, while rejecting a less favorable provision, such as a limitation on that agreed-upon

benefit.")]. The Court cannot appoint a special master to accomplish what the Court lacks authority to do. *See County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 283 (state legislation requiring local governmental entities under certain circumstances to submit to binding arbitration of economic issues that arise during bargaining with unions representing public safety employees held unconstitutional because it delegated to a private decision-maker authority reserved to local government to provide for compensation of its employees and to conduct local public financial affairs).

The varying positions taken by the City as to the benefits do not permit the Court to enter a meaningful, concrete, and specific decree under C.C.P. § 1060 based on assumed violations of Gov. Code § 1090 and/or debt liability limit laws. MP I was superseded by the *Corbett* judgment, and the City does not challenge the *Corbett* judgment. Based on its sworn interrogatory responses, the City does not challenge the Resolutions adopting the 1998 and 2000 MOUs. Ex. 1250-4. Those MOUs resulted from meet and confer over wages, benefits, and terms and conditions of employment which included and built upon benefits funded by MP I (*e.g.*, DROP program became a permanent benefit as a result of 2000 negotiations [*see* Ex. 1113]). The City does not seek to set aside the 2.5% at age 55 retirement formula enacted in 2002 for general members "on a going forward basis." Response to Intervenors' Special Interrogatory No. 434, Ex. 779-68, Ex. 1260-73. The City's interrogatory responses are binding on it. Regardless of whether a Gov. Code § 1090 violation may be "cured," the City has elected not to challenge certain MOUs, which were reached independent of funding agreements voted on by SDCERS, and to challenge certain benefits which were funded under MP I and MP II but not others. MP I and MP II have already been terminated by the *Gleason* judgment, in return for a substantial payment by the City to SDCERS to remedy underfunding caused by MP I and MP II. Assuming violations of Gov. Code § 1090, the City has not provided the Court with

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legal authority on which it may determine some benefits contained in an MOU or ordinance are void *ab initio* but others are not.

Thus, even assuming violations of Gov. Code § 1090 and/or the debt liability limit laws, the 5ACC does not raise a justiciable controversy as to which the Court may enter meaningful, concrete, and specific declaratory relief adjudicating the rights and duties of all necessary parties.

ORDER

Based on the foregoing, the Court concludes:

1) The City cannot pursue a claim that SDCERS violated the debt liability limit laws.

2) The City is barred by the judgment in *Corbett* from challenging any retirement benefits enacted by or before entry of the *Corbett* judgment, including benefits funded under MP I.

3) SDCERS participants and their beneficiaries are necessary parties to this action, whose joinder would be required for a complete resolution of the City's 5ACC.

4) However, if SDCERS participants and beneficiaries were joined as parties, the judgment in *Gleason* would be *res judicata* and would bar the City's claims under the 5ACC.

5) Even assuming that the City's 5ACC were not barred for the reasons stated above and assuming the City were to prove violations of Gov. Code § 1090 and/or the debt liability limit laws, the 5ACC does not raise a justiciable controversy as to which the Court may enter meaningful, concrete, and specific declaratory relief adjudicating the rights and duties of all necessary parties.

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Accordingly, the Court sustains Intervenors' special defenses in accordance with this Statement of Decision and awards judgment in favor of Intervenors and the *Abdelnour* plaintiffs dismissing the City's 5ACC.

DATED:_____

_____
JEFFREY B. BARTON
Judge of the Superior Court

Submitted by:

TOSDAL, SMITH, STEINER & WAX;
STRAUSS & ASHER;
CHRISTENSEN, GLASER, FINK, JACOBS, WEIL & SHAPIRO, LLP;
ROTHNER, SEGALL & GREENSTONE;

By _____
ANN M. SMITH
DAVID P. STRAUSS
JOEL N. KLEVENS
ELLEN GREENSTONE

Re: *SDCERS v. San Diego City Attorney Michael J. Aguirre, et al.* SDSC Case No. GIC841845 *(Consolidated with Case Nos. GIC951286 and GIC852100)*

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 600 "B" Street, Suite 2100, San Diego, California.

On November 28, 2006, I served the within document described as:

STATEMENT OF DECISION FOR TRIAL PHASE ONE [PROPOSED BY INTERVENORS AND ABDELNOUR PLAINTIFFS]

via the method indicated:

Party	Method of Service
Daniel F. Bamberg, Esq. Office of the City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101 (619) 533-5800 (general) (619) 533-5860 (direct) (619) 533-5856 (fax) (Attorneys for San Diego City Attorney Michael J. Aguirre and the City of San Diego)	Person Service via DLS Attorney Service
Michael A. Leone, Esq. Reg A. Vitek, Esq. Seltzer Caplan McMahon & Vitek 2100 Symphony Towers 750 B Street San Diego, CA 92101-8177 (619) 685-3003 (direct line 3071) (619) 685-3100 (fax) (Attorneys for Plaintiff San Diego City Employees' Retirement System)	Personal Service

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 28, 2006, at San Diego, California.

ELIZABETH DIAZ

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